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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 243.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY

vs.

EDGAR C. WILLIAMS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT AND BRIEF ON BEHALF OF CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

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(20,162.)

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CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY

vs.

EDGAR C. WILLIAMS.

Statement of the Case.

This case is in this court upon a certificate filed herein on March 31, 1906, by order of the United States Circuit Court of Appeals for the Eighth Circuit, which certificate (omitting caption and formal parts) is in words and figures as follows:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St. Louis, Missouri, on the 22d day of March, A. D. 1906, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in this action in favor of the defendant in error, in the United States Circuit Court for the Western District of Missouri, discloses the following facts:

"The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for $5,000 damages caused to the defendant in error, who will hereafter be called

the plaintiff, by the negligence of the servants of the railway company, the defendant below, in the operation of a cattle train, in the caboose of which the plaintiff was riding under this contract.

"BURLINGTON ROUTE.

" Live Stock Contract.

"Issued by the Chicago, Burlington & Quincy Railway Company.

"Agents of this company are not authorized to agree to forward live stock to be delivered at any specified time or for any particular market.

"Agents will permit only the names of the owners or *bona fide* employees, who accompany the stock, to be entered on the back of the contract without regard to passes allowed by number of cars.

"The contract when endorsed by the person or persons in charge and signed in ink by agent, will entitle such person or persons to ride on same train with stock to care for same, but will not entitle holder of contract to ride on any other train, nor will contract be accepted for passage on any passenger train.

"Conductor of freight train must punch contract, or in absence of punch will endorse his name on back of contract when presented for passage.

"Live stock contracts are not good for return passage. Parties entitled to return passage will be provided with return ticket on application to proper office. Conductors will be held strictly responsible for permitting persons to ride on stock contracts, except when in charge of live stock.

" No. of waybill.	No. and initial of car.	No. of animals in each car.
42	50043Q	17
43	16168Q	17

"READ THE CONTRACT.

"ROBERTSON, MO., STATION.

"This contract, made and entered into this 26 day of Sept., 1903, by and between Ed Williams of Robertson, of the first

part, and the Chicago, Burlingtin & Quincy Railway Company of the second part,

"Witnesseth, that for and in consideration of 23½ per cwt., subject to minimum weights as shown in published tariffs, the said railway company agrees to transport 2 cars loaded with cattle (number of cars, number of waybill, and number of animals as noted above), from Robertson to U. S. yards, consigned to Drumm Com. Co., and the said first party in consideration thereof agrees to deliver the said animals to the said railway company for transportation between the points aforesaid upon the following terms, viz:

"That, whereas, the said first party, before delivering the said animals to said railway company, demanded to be advised of the rate to be charged for the carriage of said animals, as aforesaid, and thereupon was offered by the said railway company alternative rates proportionate to the value of the said animals, such value to be fixed and declared by the first party or his agent; and

"Whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said railway company, and fully set forth as follows, to-wit:

"*Live Stock.*—Ratings given above are based upon declared valuations by shippers, not exceeding the following:

"Each horse or pony (gelding, mare or stallion), mule or jack	$100.00
"Each ox, bull or steer	50.00
"Each cow	30.00
"Each calf	10.00
"Each hog	10.00
"Each sheep or goat	3.00

"When the declared value exceeds the above an addition of 25 per cent. will be made to the rate for each 100 per cent. or fraction thereof, of 'additional declared valuation per head;' which said alternative rates are fully shown in and upon the regular tariffs and classifications printed, published and posted by the said company as required by law; and

"Whereas, the first party, in order to avail himself of said alternative rates, and to secure the benefit thereof, has declared, and does hereby declare, said animals to be of the value as follows, to-wit:

"Each steer, value, $50.00.

"To which value the rate aforesaid is proportioned by the classifications and tariffs aforesaid.

"Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from, or in any manner growing out of this contract, and the transportation of the said animals pursuant thereto, the value of the said animals and of each thereof, shall in no case exceed the said valuation.

"It is further agreed in consideration of the alternative rate so made by the said railway company and accepted by the first party, that in case of loss or of damage to said animals, whether resulting from accident or negligence of said railway company, or its servants, the said railway company shall not be liable in excess of the actual loss or damage; and in no case shall the said railway company be liable in any manner in excess of the agreed valuation upon each animal lost or damaged. Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line, but nevertheless in the event that the said animals are to be transported beyond the line of the railway of the second party upon and by any connecting line forming a part of the system known as the 'Burlington system' then it is expressly understood and agreed that this contract shall be for and shall inure to the benefit of the corporation operating such connecting line, and such connecting line shall be liable to perform all the obligations of this contract.

"It is further agreed that the said railway company shall in no case be liable for any loss or damage to said animals, unless a claim shall be made in writing, by the owner or owners thereof, or his or their agents, and delivered to a general freight agent of the said railway company, or to the agent of said railway company at the station from which the animals are shipped, or to the agent at the point of destination, within ten (10) days from the time the said animals are removed from the cars. And in case of loss or damage upon any connecting line, such connecting line shall not be in any manner liable unless claim shall be made in like manner in writing to such general officer or agent of such connecting line.

"*And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock, it is*

agreed that the said cars, and the said animals contained therein are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and further, that the second party shall not be liable to the first party, or any of his servants, agents, or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

"*It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge;* that the second party shall not be liable for loss from theft, heat or cold, jumping from car, or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which result from the nature or propensities of such animals, and that the railway company does not agree to deliver the stock at destination at any specified time, nor for any particular market.

"Witness the name of the railway company by its agent, and the hand of the first party, the day and year first above written.

"CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,
"By C. M. HOLT, *Agent.*

"ED WILLIAMS, *Shipper.*

"If this contract is for two or more cars, and is presented to the company's agents at the below named addresses within 3 days from date, it may be exchanged for a return pass for the above named party in charge, it being distinctly understood that said pass must be used the same day as issued.

"Atchison, Kansas, general agent's office.

"Beardstown, Ills., local freight agent's office.

"Burlington, Iowa, division freight agent's office.

"Chicago, Ills., general freight office, Union Stock Yards."

The defendant pleaded that it was exempt from liability for damages to the plaintiff by virtue of the italicized paragraph of the foregoing agreement. At the close of the trial

there was substantial evidence that the injury to the plaintiff was caused by the negligence of the defendant's servants in the operation of the cattle train; the evidence relative to the contract between the parties for the free transportation of the plaintiff was uncontradicted and it established these facts: The plaintiff resided at Robertson in the State of Missouri. He had been engaged in dealing in and shipping cattle in that State for eighteen years, had frequently made contracts of the character of that here in evidence and was familiar with this agreement, and with the rates and terms upon which the railway company transported cattle from Robertson to the city of Chicago. The defendant operated regular passenger trains and carried passengers thereon between these stations for a regular fare of about $12. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach of a passenger train. The defendant offered to carry and did transport cattle from Robertson to Chicago and bteween other places on its railroad and assumed the entire responsibility and care of them during the transportation, without furnishing free transportation to the shipper or any of his agents, and without any agreement that he or any of his agents should water, feed, or give care or attention to the cattle during the transportation, for the same price and rate as it charged and received in cases in which the owner or his agent received free transportation upon the cattle train and agreed to assume the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train, as he did in the contract in evidence. The railway company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and when desired did provide free transportation on the cattle train for one person for every two cars shipped upon the terms specified in the italicized paragraph of the agreement. Cattle were shipped each way. The railway company charged and received the

same rate, whichever method was adopted, and left the shippers free to make their choice. The majority of the shippers accepted the free transportation on the train with their cattle and agreed to care for them and to hold the company exempt from liability for any injury to themselves while they were riding on the freight train. The plaintiff and other shippers had the option to ship their cattle without free transportation for any one and to throw the entire care of the cattle on the company, or to accept the free transportation and to make the agreement to care for their cattle during the transportation and to exempt the defendant from liability for their injuries while riding upon the cattle train. The plaintiff was not requested, required, or constrained to accept the free transportation upon the cattle train upon which he rode, to assume the care of the cattle during their carriage, or to ride on the cattle train and to agree that the defendant should not be liable for his injuries while he was so carried, but he did so voluntarily, because he wished to accompany his cattle to Chicago and to sell them there. In this state of the case the trial court denied the request of counsel for the defendant to instruct the jury to return a verdict in its favor; an exception was taken to this ruling and is was assigned as error.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following question of law is presented by the assignment of errors in this case, that its decision is indispensable to a determination of this case, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following

QUESTION.

"Where the owner of cattle has the option to ship them to market at the same rate without free transportation for himself or his agents on the cattle train, to throw the entire responsibility of the care of the cattle during the transportation upon the railroad company and to travel to the market on a

passenger train of that company for the regular fare, or to accept free transportation to the market town upon the cattle train which carries his cattle, to assume the responsibility of their care during the transportation, and to agree that the railroad company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and without request, requirement, or constraint he voluntarily chooses the latter alternative, is his contract that the railroad company shall not be liable to him for such injury or damage valid?"

The prominent feature apparent in the facts of this case, as set forth in the foregoing certificate, is this: Williams, the shipper, had the option to ship his cattle without free transportation for himself, and to throw the entire care of the cattle on the company, or to accept free transportation for himself and care for the cattle during the transportation and exempt the carrier from liability for his injury while riding upon the cattle train. He was not requested, required, or constrained to accept the free transportation upon the cattle train, to assume the care of the cattle during their carriage, or to ride on the cattle train and agree that the company should not be liable for his injuries while he was so carried; but he did so voluntarily.

He had a real freedom of choice and a practicable alternative. He was under no compulsion nor was he in a position of inequality with the carrier.

Specification of Error.

The Chicago, Burlington and Quincy Railway Company alleges that the Circuit Court of the United States for the Western Division of the Western District of Missouri committed error in the following particular, viz: That said court erred in denying the request of counsel for the defendant to instruct the jury to return a verdict in its favor; to which action of the court exception was duly taken, and the same was duly assigned as error in the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF.

I.

Under the provisions of the live stock contract, the plaintiff was not a passenger for hire, and his release to the defendant of all claims for personal injuries is valid.

The clause of the contract relied on is as follows:

"And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person carried pursuant to this contract, for any injury or damage from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard."

There was at that time, and still is, a statute of Missouri, relating to the transportation of shippers of stock, in the following language:

"SEC. 1085. *Shall Transport Shippers of Stock or Melons.*—Whenever any railroad company or corporation doing business within the limits of this State shall receive and ship any live stock, or watermelons, when shipped with the privilege of peddling along the line of said road or roads, by the carload, said company shall, in consideration of the price paid for such car, pass the shipper or his employee to and from said point designated in contract or bill of lading without further expense to shippers, under penalties as in the two

preceding sections: *Provided,* That this section shall not be so construed as to permit a shipper of live stock to peddle the same along the line of said road or roads."

This statute can have no application in this case for the following reasons:

1. The statute is unconstitutional and void, because it violates the provisions of the fourteenth amendment to the Constitution of the United States.

Atchison, Topeka & S. F. Ry. Co. vs. Campbell, 61 Kan., 439.

Lake Shore Ry. Co. vs. Smith, 173 U. S., 684.

2. The statute, if valid, cannot apply to the shipment in this case, because it was an interstate shipment.

State of Kansas vs. Otis, 60 Kan., 248.

Railroad Co. vs. Husen, 95 U. S., 465.

This section of the statutes of Missouri, being therefore no part of this contract, and there being no Federal statute bearing upon the question, the free transportation upon this freight train, provided by the contract, was not a service which Williams "had a *right to demand* and which the railroad company was under *a legal duty to furnish.*"

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., *loc. cit.,* 513.

II.

The contract in question, whereby the shipper, in consideration of the free transportation given him by the carrier, agreed that the carrier should not be liable to him for any injury suffered while being so transported, is valid and binding on him.

In making this assertion we are mindful that (as stated in *Northern Pacific Railway Company vs. Adams*, 192 U. S., *loc. cit.*, 451) "this question has received the consideration of many courts and has been answered in different and opposing ways."

In the following cases, among others, the question has been passed upon and the validity of contracts of release, similar in language or legal effect, sustained:

Boering vs. Cheaspeake Beach Ry. Co., 193 U. S., 442.

Northern Pacific Railway Co. vs. Adams, 192 U. S., 440.

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., 498.

Hartford Fire Insurance Co. vs. C., M. & St. P. Ry. Co., 70 Fed., 201.

McDermon vs. So. Pac. R. Co., 122 Fed., 669.

Bates vs. Old Colony R. R. Co., 147 Mass., 255; 17 N. E., 633.

Hosmer vs. Same, 156 Mass., 506; 31 N. E., 652.

Robertson vs. Same, 156 Mass., 526; 31 N. E., 650.

L. N. A. & C. Ry. Co. vs. Keefer, 146 Ind., 21; 44 N. E., 797.

P. C., etc., Ry. Co. vs. Mahoney, 148 Ind., 196; 46 N. E., 917.

Quimby vs. B. & M. R. Co., 150 Mass., 365; 23 N. E., 205.

Muldoon vs. Seattle Ry. Co., 7 Wash., 528; 38 Am. St. Rep., 901.

Payne vs. T. H. & I. R. Co., 157 Ind., 616; 62 N. E., 473.

Griswold vs. N. Y., etc., R. Co., 53 Conn., 371; 55 Am. Rep., 115.

Rogers vs. Kennebec Steamboat Co., 86 Me., 261; 29 Atl., 1069.

Kinney vs. Central R. Co., 34 N. J. L., 513; 3 Am. St. Rep., 265.

Wilson vs. Atlantic Coast Line R. Co., 129 Fed., 774.

Long vs. Lehigh Valley R. Co., 130 Fed., 870.

A.

In *Hartford Ins. Co. vs. C. M. & St. P. Ry. Co.*, 70 Fed, 202, the Circuit Court of Appeals for the Eighth Circuit said:

"The public policy of a State or nation must be determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public."

In earlier days the rule was announced that a common carrier could not, by any means whatever, avoid the liabilities imposed upon it by the common law.

At an early date as well, it was seen that this rule was unnecessarily rigid and it is now universally conceded that a carrier *for hire* may, by special contract, limit its liability for a reasonable and just exemption from responsibility for injuries.

This rule applies to carriers of passengers for hire—to carriers exercising the functions *imposed by law* and the performance of which the passenger has a *legal right* to demand.

From negligence, whereby a passenger *for hire* may be injured, the general rule is that the carrier may not stipulate for exemption. Such is the rule in the Federal courts and it

is founded upon reasons of public policy, arising out of the public nature of the employment. Stated differently the rule may be said to exist because, when the carrier is paid his charge, or receives the consideration he is authorized by law to exact, the passenger obtains a *legal right* to demand the transportation and likewise the carrier becomes legally bound, in the performance of the public duty thus confided to him, to render the service and in rendering it, the law, for reasons of public interest and welfare, will not permit him to stipulate against his own negligence. The passenger in such a relationship is not a free agent—he requires the transportation and has a right to demand it; under such circumstances the law will not permit the carrier to trade or bargain upon the performance of this public and compulsory duty. It requires him to perform it upon demand and payment of toll, and justly exacts the highest degree of human care in the performance of it.

B.

There are services rendered by carriers, however, outside of and in addition to those above enumerated—services which the carrier is *not* under legal duty to render, and which the traveler or shipper has *no legal right to demand.* Such services are usually evidenced by special contracts announcing upon their face the voluntary character of the relationship, and which are upheld by the courts where it clearly appears that the traveler or shipper was under no duress of circumstance and had a free choice in fact of two courses:

(1) to demand by proper payment the full performance of the common law or statutory duty of the carrier, or

(2) to waive that duty and enter into a special contract upon different and limited conditions as to the duty to be performed as well as to the consideration to be rendered by him to the carrier.

Thus a limited liability for loss of property in consideration of a reduced rate of freight is upheld.

Arthur vs. Texas & Pacific Ry. Co., 139 Fed., 127.
Cau vs. Same, 194 U. S., 427.

That a common carrier may, with the assent of the shipper fairly obtained, restrict its common-law liability, is well recognized in Missouri.

Ficklin vs. Railroad, 117 Mo. App., 221.

This rule is also recognized and enforced by the United States Circuit Court of Appeals, Eighth Circuit.

M. K. & T. Ry. Co. vs. Patrick, 144 Fed. Rep., 632.

So also the carrier and shipper may, by special contract, place upon the shipper the duty to unload, feed and water stock in transit, and to that extent relieve the carrier from this duty.

Lawson on Carriers, Sec. 175.
Hutchinson on Carriers, Sec. 322.
Duvenick vs. Ry. Co., 57 Mo. App., 550.

It is a well recognized principle of law that a common carrier of cattle can contract with the shipper that either he or his agent shall accompany the cattle upon a free pass furnished by the carrier and look after them and that as to all the things to be attended to or performed by such shipper or his agent, the responsibility of the carrier ceases.

Thus in *Terre Haute and Logansport Ry. Co. vs. Sherwood*, 132 Indiana, 129, the contract between the carrier and shipper was that the former should furnish "free passage for one person intrusted by said party of the second part with the conrtol of said animals while in transit; and it is expressly agreed, that the said company shall not be liable for any damages which may occur while said animals are being loaded or unloaded, or which may result from their being

wild, vicious, unruly, or weak, or their escaping or dying, or from their injuring or killing themselves or each other."

In this case the court said:

"This case is, it is evident, not the ordinary one where the carrier has exclusive custody of inanimate property. Here we have a special contract made by the shipper and the carrier for the transportation of live stock at reduced rates of freight, and wherein it is provided that the latter shall be absolved from liability for designated perils, and that the former 'shall send with said stock one or more men, as may be necessary, to care for said stock while in transit, to load, unload, feed and water said animals at their own risk and expense.' The agreement of the owners to take charge of the animals exerts an important influence upon the case. The effect of this agreement is to place the animals in their immediate custody during transportation. Their agent is to care for them, and is to do all things expressly specified. * * * They agree that they will care for the animals, feed and water them, load and unload them, and they also agree that this shall be done at their own risk and expense. It seems clear, upon principle, that the owners are bound to aver and prove that the loss was not attributable to a failure to perform their part of the contract, or to negligence in performing the acts which they expressly undertook to perform. As to important things, they were the actors, and they were in a position to know what was done or left undone, and they cannot recover of the carrier without showing that the loss was not attributable to a breach of duty or violation of contract on their part, for they assumed duties as explicitly and fully as did the carrier."

In *Grieves vs. Illinois Central Railroad Co.*, 104 Iowa, 659, the court said:

"But the company had the right to employ the plaintiff by furnishing him transportation to accompany the stock, load and unload, water, and feed it, and if he actually undertook to do this, and injury was occasioned by his negligence, it is not perceived on what theory the carrier may be held responsible. In such a case damages result, not from any lack of care on the part of the carrier, but from that of the owner. (See *Hart vs. Railroad Co.*, 69 Iowa, 485, 29 N. W.,

597; *McCoy vs. Railroad Co.*, 44 Iowa, 424.) Now, if the owner undertakes to oversee the transportation of his stock and to attend to loading and unloading it, feeding and watering it, whether by contract or voluntarily, and it suffers injury through his fault, he cannot recover, though the contract in no way relieves the company from liability. Hence the section of the statute is not applicable in such a case. From his familiarity with the animals he is presumed to know what care is required better than a stranger, and, having undertaken to bestow this, the company is not liable for his omission to do so, unless resulting from its failure to furnish proper facilities therefor or reasonable opportunity for so doing. In other words, the carrier is liable for such losses only as result from its failure to discharge duties not assumed and undertaken by the shipper. *Railway Co. vs. McRae* (Tex. Sup.), 27 Am. St. Rep., 926, and note (S. C., 18 S. W., 672); *Johnson vs. Railway Co.* (Miss.), 11 So. Rep., 104; *Clarke vs. Railroad Co.*, 67 Am. Dec., 205, and note; 5 Am. & Eng. Enc. Law (2d ed.), 440."

It cannot be reasonably urged that the shipper is a passenger, who accompanies his cattle, horses, hogs or sheep, and lawfully contracts to superintend to the loading and unloading of them and to the feeding and watering of them and whose duty it is to get his stock up when they fall down and to protect his entire shipment from those that may be vicious and protect them from suffocation or overheating and who in the discharge of these obligations must sometimes be on top of the freight cars and at other times inside with his cattle. He may ride in the caboose attached to the freight train a part of the time or even most of the time and a part of the time he will be working in and about the train. Will it be said that while riding in the caboose he is a passenger, but when he is working in or about the freight cars he is not?

It cannot be said, in view of the authorities upon this subject, that the contract is invalid so far as the stipulation of the shipper to look after his cattle is concerned; provided his agreement has been entered into without constraint or compulsion and freely upon his part; how then can it be claimed

that the shipper is a passenger when the obligation he has assumed and the duties he is required to perform take away from him all the characteristics of a passenger?

C.

Upon the same principle, liability for injuries to the traveler, whether from negligence of the carrier or otherwise, may be waived by special contract, where the traveler, having a free choice, elects not to demand the performance by the carrier of his common-law duty, but is content in consideration of free or voluntary transportation to release the carrier from such liability.

Mr. Justice Shiras, in *B. & O. Ry. Co. vs. Voight, supra,* said:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

Such special contracts do not violate any consideration of public policy. They are private contracts, containing no element of public or compulsory duty or public right, and in such the public has no interest.

In *Hartford Ins. Co. vs. C. M. & St. P. Ry. Co., supra,* it was held, in considering a question of this character:

"Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent jurisdiction with those of the State and while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment."

In *Northern Pacific Ry. Co. vs. Adams,* 192 U. S., 440, the deceased traveler, Adams, was riding upon a free pass containing a release from liability for injuries from negligence of the company or otherwise.

The Supreme Court stated the question for decision in these words:

"Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?"

And answered the question thus:

"In the light of this decision (*Baltimore & Ohio, etc., Railway vs. Voight,* 176 U. S., 468) but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. *He was not in the power of the company and obliged to accept its terms. They stood on an equal footing.* If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, *it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.*"

The *Adams case,* from which the foregoing quotation was taken, was cited by this court in *Boering vs. Chesapeake Beach Ry. Co.,* 193 U. S., 442, 449, as settling and determining the question there presented in favor of the carrier. The question was whether a passenger riding on a free pass which contained this stipulation: "The person accepting and using this pass thereby assumes all risk of accident and dam-

age to person and property, whether caused by negligence of the company's agents or otherwise," could recover for injuries received while riding thereon. This court held he could not.

Baltimore & Ohio Ry. Co. vs. Voight, 176 U. S., 498, was a case of an injury to an express messenger employed by the United States Express Company, while riding in an express car; the relationship and rights of the parties were determined by a contract between the railway company and the express company, under which Voight rode free of charge by the railroad company, and by the terms of his contract of employment by the express company he assumed all risk of accident, whether from negligence or otherwise, of any railroad upon which he might be called upon to ride.

The railroad company pleaded this release in bar and in sustaining the plea this court said:

"It is evident that, by these agreements, there was created a very different relation between Voight and the railway company than the usual one between passengers and railroad companies. Here there was *no stress brought to bear on Voight* as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, especially adapted to the use of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of the car. His contract to relieve the company from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liabilities for injuries was made a *condition* of a transportation *which the passenger had a right to demand and which the railroad companies were under a legal duty to furnish.* Doubtless, had Voight only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. *But this he did not desire.* He

was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract, which as we have seen, *the railway company was under no legal compulsion to enter into.*

"The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. *His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company.* And, of course, if his position was that of a common employee of both companies he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants.

"However, this may be it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood case."

And again:

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voight, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company vs. Lockwood;* that *he was not constrained* to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same *freely and voluntarily,* and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Hartford Fire Insurance Co. vs. C., M. & St. P.*

Ry. Co., 70 Fed., 201, had occasion to consider the principle for which contention is now made, namely, the right of a common carrier, when called upon to perform a service not enjoined upon him by law, to divest himself of his character as such and by special contract limit his liability even for his own negligence.

In that case the railroad company had leased a portion of its depot grounds at Monticello, in the State of Iowa, to Simpson, *et al.*, who proposed to and did erect buildings thereon, but one of the conditions of the lease was that the railroad company should be held harmless from all claims for fire, even caused by negligence. A fire did occur with a consequent loss and the insurance company having paid the loss, brought action against the railroad company, claiming to be subrogated to the rights of Simpson for damages. The railroad company pleaded this release in bar, and in passing upon the validity of this plea the court held:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

And again:

"The reasons why an unreasonable and unjust contract between a common carrier and another, exempting the former from liability for negligence, is against public policy and void are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees. A contract in a lease by a railroad company of a portion of its right-of-way, that it shall not be liable to the lessees for any damages, caused by fire set by the negligence of itself or its employees to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule, and is not void, because it does not fall within its reasons. A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier, or as a *quasi* public corporation. The contract leaves it under the

same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care, after a lease containing such a contract is executed, that it would have been required to exercise if no such agreement had been made. *Express Co. vs. Caldwell,* 21 Wall, 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or to refuse to make the contract."

Railroad Company vs. Lockwood, 17 Wallace, 357, is a leading and often cited case. It is in some cases referred to in support of the broad proposition that a stock drover riding upon a "drover's pass" in charge of stock is a passenger for hire.

If this case so decides, it must be frankly conceded that it is decisive of that defense raised in the case at bar. With deference, however, it is earnestly submitted that such an interpretation of that case is altogether erroneous, and it will be the purpose of this brief, as briefly as possible, to show the clear distinction between the *Lockwood case*, as the *facts* show it to have been, and the case at bar, and also to show that under the principles obtaining in the more recent opinions of the Supreme Court, the *Lockwood case* does not apply to the *facts* in the record of the case now under consideration.

In the *Lockwood case* the report contains the following statement of facts bearing upon this question:

"Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle on the train, and *had been required,* at Buffalo, *to sign an agreement* to attend to the loading, transporting and unloading of them, and to take all risk of injury to them and of personal injury to himself or to whomsoever went with the cattle; and he

received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany; but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. *The agreement stated its consideration* to be the carrying of the plaintiff's cattle at *less than tariff rates.* It was shown on the trial, that these rates were about three times the ordinary rates charged, and *that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff,* and received similar passes."

Thus it appears that the railroad company had but *one method* of carrying cattle—*i. e.,* under a contract which the shipper *was required to sign* in order to secure the transportation of his cattle. That contract compelled the shipper to go with his cattle and take care of them, and, being so compelled, the company also required of him a release from claims for injuries. The company did not attempt to perform its common-law or statutory duty, but carried cattle only upon its own special terms, and hence the shipper dealing with it was not a free agent in dealing with it.

In the case at bar the contract of free carriage of Williams on the cattle train was not based upon, nor did it have anything to do with, the rate charged for transporting the cattle. The contract contained independent and separable clauses, viz: (1) one for the transportation of the cattle; and (2) one for the free transportation of the shipper. The clause relating to the free transportation of the shipper was based upon its own separate and independent consideration, while the transportation of the cattle was based upon another entirely separate and independent consideration.

Mr. Justice Bradley, in stating the question thus raised, first stated his view of the *facts* before him in the record, thus:

"It may be *assumed, in limine,* that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet *his passage* was one of the *mutual terms* of the arrangement *for carrying his cattle.*"

Thus the facts stated by the learned justice are that, before the railroad company would carry *the cattle* (not the shipper), it *required* him to sign this agreement for a release of liability for personal injuries. It distinctly refused to perform its *public duty of a carrier of cattle* until the shipper had entered into this agreement.

As stated in the later case of *Liverpool Steam Co. vs. Phœnix Ins. Co.*, 129 U. S., *loc. cit.*, 441:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle and stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

So also in the opinion in the *Lockwood case* (p. 381) Mr. Justice Bradley said:

"And then the inequality of the parties, the *compulsion* under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

Thus the turning point of the *Lockwood case* is clearly seen to have been that the shipper, *to secure the transportation of his cattle,* was *required* to sign the agreement. Such was the record before the learned justice who announced the decision, and such has been the construction of the record in that case by the Supreme Court in subsequent cases and by other courts as well.

For instance, in *Liverpool Steam Co. vs. Phœnix Ins. Co., supra,* the Supreme Court (p. 439) spoke of the *Lockwood case* as follows:

"It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement *which it had required him to sign,* and by which he was to pay certain rates for the

carriage of the cattle, to pass free himself and to take the risks of all injuries," etc.

And in *Quimby vs. Boston & Maine R. R. Co.,* 150 Mass., 365; 23 N. E., 205, the Supreme Court of Massachusetts stated, in referring to the *Lockwood case,* that "it is there held that such a pass is not gratuitous, as it is given as *one of the terms upon which the cattle are carried.*"

The case of *Rogers vs. Kennebec Steamboat Co.,* 86 Me., 261, in considering the Lockwood case, analyzed it in the following words:

"In the great case of *Railroad Co. vs. Lockwood,* 17 Wall., 357, the federal court reached the conclusion that a condition on a 'drover's pass,' requiring the person using it to travel at his own risk, was not a valid and effectual one, and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision was put on the ground that a drover's pass was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one."

Finally (without unduly multiplying the citation of authorities), in both *Baltimore & Ohio Ry. Co. vs. Voight,* 176 U. S., 498, and *Northern Pacific Ry. Co. vs. Adams,* 192 U. S., 440, the meaning and proper construction of the *Lockwood case* is thus stated (*Voight case, loc. cit.,* p. 520; *Adams case, loc. cit.,* p. 453):

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voight, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company vs. Lockwood;* that *he was not constrained* to enter into the contract whereby the railroad company was exonerated from liability to him, *but entered into the same freely and voluntarily* and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

D.

"Such a contract" means, therefore, one "freely and voluntarily" entered into, as contrasted with one into which the party is constrained to enter. The former does not contravene public policy—the latter does.

To the former belong those contracts with carriers wherein the shipper or the traveler is under no stress of circumstance nor "in the power of the company and obliged to accept its terms" (*Adams case*, p. 453), and wherein he is enjoying the benefit of a contract which he had no legal right to demand and which the railroad companies were not under a legal duty to furnish.

To the latter belong those contracts with carriers wherein the shipper or traveler is under constraint and is demanding of right the performance of the duty of the common carrier as such and is rendering to it its legal toll for such service.

The distinction thus indicated seems clearly warranted by the better weight of authority and is the rule which distinguishes the cases of *Railway Co. vs. Stevens*, 95 U. S., 655, and *Delaware, L. & W. R. Co. vs. Ashley*, 67 Fed., 209.

In the latter case the court, on page 212, states the facts thus:

"By the contract between the initial company and Jordan, *the car and one man*, in consideration of an agreed-upon freight charge were to be carried to New York. The plaintiff was a passenger for hire, for *his passage was one of the mutual terms of the arrangement for carrying the poultry.*"

In *Payne vs. Terre Haute, etc., Ry. Co., supra*, the Supreme Court of Indiana recognized this distinction in the following language:

"The precise question raised by this appeal has not heretofore been presented to this court, but the principles announced in the Keefer, Mahoney and Russell cases, *supra*, are controlling. In these cases it is expressly declared to be a well established rule that railroad companies, though pub-

lic or common carriers, may contract *as private carriers* for the transportation of persons whom they are not bound as common carriers to receive. In the Keefer and Mahoney cases the court held that railroad companies were not required under the duties they owe to the general public to carry express matter for express companies, that with respect to such transportation they were authorized to contract as private carriers, and that a waiver of liability for negligent injury of express messengers was enforceable. In the Russell case the same doctrine was applied to an action by a porter upon a Pullman sleeping car. These cases prove that private carriers, even for hire, may lawfully attach conditions of exemption for negligence to their contracts for carriage, and *that the test whether a particular contract is that of a public or private carrier is whether the customer, as one of the general public, had the right to compel the carrier to undertake the transportation.* As stated in the Russell case: 'The inquiry remains, is the present contract of exemption invalid, as being within the theory of the rule above explained? If it is it must be by virtue of some positive statute, or because of the fact that it is an abandonment by the carrier of a public duty.' There is no statute that affects the question. If express messengers and Pullman porters, who are on the trains in pursuance of their regular vocations, and whose transportation is paid for cannot require railroad companies to carry them as a public duty, much less can holders of gratuitous passes. They are creatures of favoritism. They voluntarily separate themselves from the general public. They do not approach the companies as part of the general public, to be carried on the usual terms of service and compensation, and they are certainly under no compulsion to enter into the contract of exemption. The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the general public gratuitously."

In *McDermon vs. So. Pac. R. Co., supra*, the relationship of a Pullman porter to the railway company under a contract similar to that in the Voight case came under examination, and in view of the voluntary nature of the undertaking by the plaintiff of his employment, his contract of release was upheld.

The court, after examining numerous authorities, said:

"I am unable to perceive any difference in principle between the porter on a car of the Pullman Company and that of a messenger in an express car. The porter is hired and paid by the Pullman Company. He is subject to its orders, and alone under its control. Such positions are much sought after by such persons as the plaintiff, and in consideration of such favorable position they are more than willing to accept the conditions of their employment imposed upon this plaintiff; and I can perceive no interest of public policy that should prevent him from obtaining such position on his *voluntary acceptance of the conditions* imposed by his employer."

In *Robertson vs. Old Colony R. R. Co.*, 156 Mass., 526, the action was by an employee of a circus company for injuries received while upon defendant's railroad, and it appeared that the circus was being carried under a special contract containing a release from such claims. The Supreme Court of Massachusetts said:

"Unless the defendant was under a common law or statutory obligation to carry the plaintiff *in the manner* he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus whose servant the plaintiff was."

And again:

"This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

To the same effect are *Hosmer vs. Old Colony R. R. Co.*, and *Bates vs. Old Colony R. R. Co., supra.*

In *Griswold vs. N. Y. & N. E. R. R. Co.*, 53 Conn., 371, the Supreme Court of Connecticut referred to the *Lockwood case* in this way:

"The Supreme Court of the United States, in *Railroad Company vs. Lockwood,* 17 Wall., 357, where a drover had a free pass to accompany his cattle on their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle for which he paid."

And then held:

"In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and, therefore, the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers. The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of other passengers higher. If, however, fares are unreasonable, they may be subject to governmental regulation. But it will suffice to say that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy. Many other gratuities and charities might be named, which though conceded to be commendable, would have a similar effect.

"Again in *Railroad Company vs. Lockwood,* and in other cases advocating the same doctrine, one prominent reason given for holding the contract void, as opposed to public policy, is that in making the contract the carrier and his customer do not stand on a footing of equality; that the latter is only one individual against a powerful corporation, which has him in its power, and that he cannot afford to higgle in regard to terms. It is manifest that this reason has no application at all to a free passenger. If his position is not superior it is at least equal to that of the railroad company. The latter will not often be found urging the acceptance of free passes. There is no possibility of any higgling on the part of the passenger for more favorable terms, and the solicitation for the pass itself will come from the latter also. Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants, the risk being well known and willingly assumed by the passenger as a condition upon which the gift is made."

The courts of England, Ireland, and Canada most decisively hold that a carrier may secure exemption from liability by a stipulation in a drover's pass "assuming all risk." *McCawley vs. Furness Ry. Co.*, L. R., 8 Q. B., 57; *Hall vs. Northeastern Ry. Co.*, L. R., 10 Q. B., 437; *Duff vs. Great Northern R. R. Co.*, Ir. L. R., 4 Com. Law, 178; *Gallin vs. London & N. W. R. Co.*, L. R., 10 Q B., 212; *Alexander vs. Toronto & C. Ry. Co.*, 33 Up. Can. Q. B., 474.

In many cases the same distinction is accepted as established law, and *the test* would seem, therefore, to be:

Was the release given as a condition of a transportation or of a service rendered, which the traveler or shipper had a right to demand and which the railroad company was under a legal duty to furnish?

Or, was the shipper under any constraint, so that he did not freely and voluntarily enter into the contract?

If both of the foregoing questions be answered in the negative, the contract must be upheld.

The authorities hereinabove cited seem to have established the following reasonable rule: If a person voluntarily makes a special contract by which special rights or privileges are secured to himself, in consideration that he shall assume certain risks which the law imposes upon a common carrier, *such contract makes the carrier, as to such person, a special carrier in the performance of that particular contract,* and such contract is not against public policy.

Turning again to *Railroad Co. vs. Lockwood, supra,* Mr. Justice Bradley, after reviewing many authorities, used this language:

"A common carrier may undoubtedly become a private carrier or a bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry."

And again:

"If the customer *had any real freedom of choice, if he had a reasonable and practicable alternative,* and if the employ-

ment of the carrier were not a public one, charging him with the duty of accommodating the public in the hire of his employment; then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept."

And again:

"And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

From these quotations, coupled with the recitals of the facts in the report of the *Lockwood case,* as set forth hereinbefore, and in the opening paragraph of Mr. Justice Bradley's opinion, wherein he assumes that Lockwood was a passenger for hire, in that "his passage was one of the mutual terms of the arrangement for carrying his cattle," it would seem conclusively to appear that the learned Justice was dealing with a case wholly different and distinct in its facts from the one at bar.

The *Lockwood case* was one wherein the "customer" was met with a condition which he was "compelled to accept;" a case in which the customer stood in a position of inequality and one in which the customer was under a "compulsion." Lockwood, in order to secure the transportation of his cattle, was *required* to release the company from liability for personal injuries to himself. The alternative was the payment of rates three times the ordinary rates charged, obviously not the "practicable alternative" Mr. Justice Bradley had in mind. Lockwood stood in the position of demanding of the carrier the performance by it of its public

duty as a common carrier. He was not asking consideration at its hands, but demanding of it the performance of its public duty. He was willing to pay the ordinary toll, but the railroad company wrongfully refused to perform its public duty except upon condition.

Lockwood therefore, *having no freedom of choice* and being thus in a *position of inequality,* was not a free agent in executing his release to the company.

E.

Turning again to the certificate of the honorable judges of the Circuit Court of Appeals for the facts in this case, it will be seen that the carrier operated regular passenger trains and carried passengers thereon, on which the shipper might have ridden to Chicago for the regular fare of about $12. He had a right to do that, and it was the duty of the company to so carry him, if he desired. But he was a man of experience in shipping cattle, had frequently made contracts of the character in question, was familiar with the agreement, and with the terms and rates upon which the company transported cattle. The danger of accident and injury to one riding in the caboose of a cattle train is about four times the danger to one riding in a coach on a passenger train. The company offered to transport the cattle and assume the entire responsibility and care of them during transportation, without furnishing free transportation to the shipper, for the same price and rate as it charged in cases where the shipper received free transportation upon the cattle train and assumed the responsibility of the care of the cattle and the risk of his own injury while riding upon the freight train. The company preferred to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and, when desired, did provide, free transportation on the cattle train upon the terms specified in the italicized paragraph of the agreement.

The company charged the same rate for transporting the cattle, whether the shipper went along under the free transportation or not, and *left the shipper free to make his choice.* The shipper had the option to ship his cattle without the free transportation for himself and to throw the entire care of the cattle upon the company, or to take the free transportation and agree to care for the cattle and exempt the company from liability for his injury while riding upon the cattle train. *He was not requested, required, or constrained* to accept the free transportation, to assume the care of the cattle, or to ride on the cattle train and agree that the company should not be liable for his injuries; *but he did so voluntarily, because he wished to accompany his cattle to Chicago and to sell them there.* He could have paid his fare and gone to Chicago on a regular passenger train; but he preferred to save the fare, wished to accompany the cattle and to ride on the train with them, and, of his own free will and volition, stipulated and agreed with the company as follows:

"And in consideration of free transportation for one person, designated by the first party, hereby given by said railway company, such persons to accompany the stock; it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such persons, for the purpose of attention to and care of the said animals, and that the said railway company shall not be responsible for such attention and care; and, further, that the second party shall not be liable to the first party, or any of his servants, agents or copartners, or other person, carried pursuant to this contract, for any injury or damage, from whatever cause, suffered or incurred while being so carried. And the first party agrees that, before setting out upon the journey, he will fully inform each of the persons to be carried pursuant hereto of the provisions of this contract in this regard.

"It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." * * *

Therefore the *particular service* which in this case and under this contract the railroad company was not compelled by law to render, and which Williams had no legal right to demand, was the transportation by the company of himself upon a freight train.

It had a legal right to exclude him from this freight train. He had no legal right to ride upon it. The only right he could obtain to be upon it was secured by this contract.

In *Whitehead vs. Ry. Co.*, 99 Mo., 268, the Supreme Court of Missouri said:

"There can be no doubt but a railroad company, being a carrier of freight and of passengers, may use separate trains for freight and for passengers, and may exclude freight from one and passengers from the other. *Railroad vs. Bartrom*, 2 Ohio St., 459; *Dunn vs. Railroad*, 58 Me., 187.

Further citation of authorities in support of this familiar proposition would not seem to be necessary.

As hereinbefore stated, the contract for transporting the shipper was separable from the contract for transporting the cattle. Each stood upon its own basis; and the stipulation for the free transportation of the shipper and consequent release of the company for injuries to him while riding on the cattle train was of his own free will and volition. *The company owed him no duty to carry him on the cattle train*, much less a duty to so carry him free of charge—especially when it stood ready and willing to carry him on its regular passenger train on payment of the regular fare. The company contracted with him on the terms set out in the agreement, not because it wanted him to enter into such a contract, but because he wanted the company to so contract with him. As stated by the honorable judges of the Circuit Court of Appeals:

"*The company preferred* to carry and care for the cattle without furnishing transportation to any one upon the freight trains, but nevertheless it offered to provide, and, *when desired*, did provide free transportation on the cattle train for

one person for every two cars shipped, upon the terms specified in the italicized paragraph of the agreement."

We respectfully submit that, under the established facts in this case and the legal principles applicable thereto, the contract in question ought to be upheld, and the question propounded by the learned Circuit Court of Appeals for the Eighth Circuit should be answered in the affirmative.

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